STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 27, 2004
v	No. 248686 Eaton Circuit Court
ROGER DUANE LANCASTER, Defendant-Appellant.	LC No. 02-020399-FC

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of six counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a). The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to 281 to 600 months' imprisonment on each count, to be served concurrently. We affirm.

Defendant first argues that the trial court abused its discretion in admitting the testimony of the victim's boyfriend regarding statements that the victim had made about defendant's molestation of her. Defendant asserts that this evidence was hearsay and was inadmissible pursuant to MRE 801(d)(1)(B). We disagree.

"The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made," *id.* at 419, or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002); *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

MRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." However, MRE 801(d) provides that certain statements are not considered to be hearsay, and therefore are not barred by the general prohibition against hearsay. MRE 802. Among these are prior consistent statements. A prior consistent statement is admissible if four requirements are met: (1) the declarant testifies at trial and is subject to cross-examination, (2) there is an express or implied charge of recent fabrication or improper influence or motive of the declarant's

testimony, (3) the statement is consistent with the declarant's challenged in-court testimony, and (4) the prior consistent statement was made prior to the time that the supposed motive to falsify arose. MRE 801(d)(1)(B); *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000).

Defendant bases his challenge to the victim's boyfriend's testimony on an assertion that the declarant in this case was not the victim, but rather her boyfriend, and that none of the boyfriend's statements were challenged. However, MRE 801(b) defines a declarant as "a person who makes a statement." Here, the statements that defendant objected to were not prior statements that the victim's boyfriend made, but the statements that the victim made to her boyfriend. Accordingly, the declarant in the present case is not the boyfriend, but rather the victim.

Further, we conclude that the challenged testimony meets all four prongs of the test set forth in *Jones, supra*. The victim testified at trial, advised the court that she had made statements to her boyfriend in November 2001 concerning defendant's molestation of her, and was subject to cross-examination regarding these statements. In his opening statement, defense counsel at the very least implied, if not expressly asserted, that the victim's allegations were a recent fabrication, made up sometime during the nine months between the time the victim and her mother moved out of defendant's home and the time the victim reported the allegations to her mother and the police. Further, the victim's boyfriend testified that the victim had informed him that every time she wanted to go do something or needed money, she had to perform sexual favors for defendant. The boyfriend also testified that the victim had told him that defendant would force her to perform oral sex and would perform oral sex on the victim, and that the victim had described to him how defendant had once tied her down and attempted to have intercourse with her. These statements are entirely consistent with the victim's challenged testimony. Finally, the boyfriend testified that the victim made these statements in November 2001, one month before the victim and her mother moved out of defendant's home. Therefore, the victim made the statements in question before the time the supposed motive to falsify arose. Thus, the challenged testimony was admissible as a prior consistent statement pursuant to MRE 801(d)(1)(B).

Defendant next argues that the trial court abused its discretion in admitting testimony from defendant's biological daughter that defendant had sexually abused her twenty years earlier. Again, we disagree. We review the trial court's evidentiary rulings for abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001).

MRE 404(b)(1) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). Evidence of similar misconduct is logically relevant to show that a charged act occurred where the other act and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. *Id.* at 63.

In the present case, the offenses with which defendant was charged and the molestation alleged by his biological daughter were extremely similar. Both involved a father-daughter

relationship. Both girls suffered the worst of their molestation at the age of ten or eleven. In both instances, defendant at least attempted to engage in sexual intercourse with the victims and engaged in uncommon sexual conduct. Defendant also used threats to keep each girl from disclosing the abuse. Accordingly, the charged offenses and defendant's alleged prior molestation of his biological daughter are sufficiently similar to support an inference that they were manifestations of a common plan, scheme, or system, and were therefore relevant to show that the charged acts occurred. *Sabin*, *supra*.

Moreover, the probative value of Lancaster's testimony was not substantially outweighed by the danger of unfair prejudice. Unfair prejudice does not mean damaging, because any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod on other grds 450 Mich 1212 (1995). Rather, unfair prejudice results when minimally probative evidence might receive consideration from the jury substantially out of proportion to the logically damaging effect of the evidence, or when it would be inequitable to allow the use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). In the present case, the challenged testimony was highly probative. Precisely because of the great similarity between the alleged molestation and the charged acts, this evidence made it substantially more probable that defendant committed the charged crimes than it would have been had the challenged testimony not been presented. As a result, the risk that the jury would give this evidence consideration substantially out of proportion to its logically damaging effect was correspondingly low.

Thus, because the other-acts testimony was offered for the proper purpose of showing a common plan, scheme, or system, was relevant to a fact in issue, and its probative value was not substantially outweighed by the danger of unfair prejudice, the trial court did not abuse its discretion in admitting this evidence.

Defendant next argues that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that defendant was guilty of the crimes with which he was charged. However, defendant has failed to properly address the merits of this argument. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Hermiz*, 235 Mich App 248, 258; 597 NW2d 218 (1999). In any event, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004); MCL 750.520b(1)(a). Moreover, defendant's statement of the issue essentially questions the victim's credibility, but "[q]uestions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Finally, defendant argues that the trial court committed plain error in scoring offense variables ("OV") 3, 4, 10, and 13, and that the court further violated defendant's right against ex post facto laws in scoring OV 13. Once again, we disagree.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.* at 468. We review questions of constitutional law de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We note that defendant has failed

to preserve for appellate review his argument regarding the scoring of OV 4 and the alleged ex post facto violation in OV 13, and thus our review of these unpreserved challenges to the scoring guidelines is for plain error affecting defendant's substantial rights. *People v Kimble*, 252 Mich App 269, 275-278; 651 NW2d 798 (2002), aff'd __ Mich __ (2004) (Docket No. 122271, issued 6/29/04).

With regard to defendant's unpreserved challenge to the scoring of OV 4, MCL 777.34, we find no plain error. Defendant argues that the trial court erred in scoring ten points for OV 4, which concerns psychological injuries caused to a victim, and it provides that ten points should be assigned if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). The statute further explains, "[s]core 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2). Before sentencing, the victim submitted a victim impact statement to the court in the form of a letter. The victim read this letter into the record at sentencing, and the court indicated that it had read it before sentencing. In this letter, the victim stated that she had lost self-esteem, confidence, and trust in males, and that she suffered flashbacks as a result of defendant's abuse of her. The victim further stated that she continued to suffer from emotional breakdowns as a result of the abuse, and that defendant had caused her a lot of mental and emotional pain and suffering. Thus, the trial court's scoring of OV 4 was supported by the victim's impact statement.

The trial court scored OV 3, MCL 777.33, at five points. The legislative guidelines provide that a defendant should be scored five points if "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e). The victim testified that on one occasion defendant attempted to insert his penis in her anus, that this hurt, and that she bled as a result of defendant's attempt. This evidence supports the scoring of OV 3.

Defendant additionally argues that the trial court erred in scoring fifteen points for OV 10, MCL 777.40. This variable concerns the exploitation of vulnerable victims, and it provides that fifteen points should be assigned if predatory conduct was involved. MCL 777.40(1)(a). MCL 777.40(3)(a) defines "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization."

In the present case, the victim testified that defendant began abusing her when she was approximately six years old. The abuse began with touching her breasts or vagina with his hands and his mouth. After the victim informed a school counselor and police that defendant was touching her inappropriately, the abuse stopped for a couple of months. Between her fifth- and sixth-grade years, however, defendant began abusing the victim again, not only touching the victim sexually, but now forcing her to touch defendant sexually as well, both with her hand or her mouth. Defendant would also often insert his fingers in the victim's vagina. Eventually, defendant began attempting to insert his penis in the victim's vagina, or in her anus, and on one occasion he tied the victim to the bed and attempted to insert a dildo in the victim's vagina. Moreover, defendant throughout this time would play pornographic videos for the victim as she ate her morning cereal. This testimony reveals a continuing pattern of increasingly more severe

abuse. Under these circumstances, there is evidence to support the court's assignment of 15 points against defendant in connection with this variable. See *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003).[1]

Finally, defendant argues that the trial court erred when it assigned him fifty points in connection with OV 13, MCL 777.43, and that in so doing the court violated his constitutional rights against ex post facto laws. It is true as defendant asserts, that the Legislature modified OV 13 to include a new fifty-point category, and that this modification in the scoring guidelines became effective October 1, 2000. Defendant asserts that all of the charged crimes took place between 1997 and the summer of 2000, as stated in the victim's statement made to police in September 2002, and that therefore the modified guidelines were not applicable. However, while admitting that in her police statement she had stated that defendant's abuse of her had stopped in the summer of 2000, at trial the victim testified that she had made an error in so stating, and that the abuse had actually continued until the winter of 2000. Because the abuse leading to the present charges continued past the effective date of the modified guidelines, those guidelines were, in fact, applicable to defendant.

Considering the score assessed, OV 13 provides that fifty points should be assigned if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age." MCL 777.43(1)(a). MCL 777.43(2) states in relevant part that all crimes within a five-year period, including the sentencing offense, must be counted, regardless of whether the offense resulted in a conviction, MCL 777.43(2)(a), and that fifty points should be scored only if the sentencing offense is CSC I, MCL 777.43(2)(d). In the present case, the sentencing offense was CSC I, and all of the offenses occurred within the period between 1997 and the winter of 2000. Therefore, there is evidence in support of the court's scoring decision regarding OV 13, and the trial court did not commit plain error in scoring OV 13 at fifty points.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

[1] In *Witherspoon*, *supra* at 336, this Court concluded that the trial court had correctly found predatory behavior to have occurred where the timing of the assault, i.e., when no other persons were present, and the location of the assault, namely "in the isolation and seclusion of the basement," were evidence of preoffense predatory conduct. In the present case, the victim testified that defendant's abuse of her would occur at those times when her mother, the only other person living at the home besides defendant and the victim, was away from home, and she stated that the abuse always occurred in defendant's bedroom. As in *Witherspoon*, *supra*, the timing and the location of the assaults in the present case similarly are evidence of preoffense predatory conduct.